No. 88-217

In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

PITTSBURGH & LAKE ERIE RAILROAD CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

Congress has provided that, except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, is reserved to officers of the Department of Justice, under the direction of the Attorney General. 28 U.S.C. 516, 519. Congress has further provided that, except as the Attorney General in a particular case otherwise directs, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in this Court in which the United States is interested. 28 U.S.C. 518. The Interstate Commerce Commission (ICC), an "independent establishment of the United States Government" (49 U.S.C. 10301), contends that, notwithstanding those provisions, it is entitled to intervene in this labor dispute be-

tween two private parties and present its views, through its own lawyers, to this Court. The Solicitor General respectfully submits this brief amicus curiae to advise the Court of the United States' position on that matter.[1]

STATEMENT

The ICC petitions for a writ of certiorari to review a court of appeals' decision holding that the Pittsburgh & Lake Erie Railroad Company (P&LE) is obligated to bargain with its unions, in accordance with the provisions of the Railway Labor Act, 45 U.S.C. 151 *et seq.*, over the effects of P&LE's proposed sale of its rail lines to another company.

1. P&LE is a small railroad that owns and operates 182 miles of rail line in western Pennsylvania and eastern Ohio. P&LE has experienced financial difficulties and, on July 8, 1987, it entered into an agreement to sell its rail lines to P&LE Railco, Inc. (Railco), a newly formed company that intended to operate those lines with a reduced contingent of employees. Railco's acquisition of P&LE's rail lines was subject, among other legal and practical conditions, to the ICC's approval in accordance with the Interstate Commerce Act (ICA), 49 U.S.C. 10101 *et seq.*[2] See Pet. App. 23a-25a.

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[1] On June 30, 1988, the Court entered an order inviting the Solicitor General to express the views of the United States with respect to two petitions for a writ of certiorari (*Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives Ass'n*, No. 87-1589, and *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, No. 87-1888) filed by one of the private parties in this case. The Solicitor General will file a brief in response to that invitation addressing in detail the merits of the issues raised in those petitions.

[2] The ICA establishes a national transportation policy to promote efficient, competitive carriage of goods and persons (49 U.S.C. 10101, 10101a) and creates the ICC to implement that policy (49 U.S.C. 10301 *et seq.*). The ICA grants the ICC broad jurisdiction over

When informed of the proposed sale, P&LE's unions requested the railroad to serve notices under Section 6 of the Railway Labor Act, 45 U.S.C. 156, and commence collective bargaining with the unions over its decision to discontinue its railroad business and the effects of that decision on the unions' members. P&LE responded that it had no duty to bargain under the circumstances. The Railway Labor Executives' Association (RLEA), on behalf of P&LE's unions, then brought an action in the United States District Court for the Western District of Pennsylvania to enjoin the sale and force P&LE to bargain. On September 15, 1987, the unions commenced a general strike of the P&LE. See Pet. App. 25a, 27a.

Shortly thereafter, on September 19, 1987, Railco filed a "notice of exemption" with the ICC seeking exemption from the ICA approval process under the ICC's "non-carrier" exemption regulations. See *Ex Parte 392 (Sub. No. 1), Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* 1 I.C.C. 2d 810 (1985), review denied mem. *sub nom. Illinois Commerce Comm'n* v. *ICC,* 817 F.2d 145 (D.C. Cir. 1987).[3] Under

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various forms of transportation, including rail carriage (49 U.S.C. 10501), and gives the ICC power to exempt carriers from ICA regulation (49 U.S.C. 10505). The ICA specifically regulates, inter alia, the construction and operation (49 U.S.C. 10901) or abandonment (49 U.S.C. 10903) of rail lines and the combination (including consolidation, merger and acquisition of control) of rail carriers (49 U.S.C. 11341 *et seq.*).

[3] The ICA generally provides that a party may acquire a rail line only if the party first obtains ICC approval. See 49 U.S.C. 10901. However, the ICC is empowered to exempt a person, class of persons, or transaction from the Section 10901 approval process if it finds that ICC oversight is "not necessary to carry out" the national rail transportation policy and is "not needed to protect shippers from the abuse of market power" (49 U.S.C. 10505(a)). In 1985, the ICC established a blanket exemption for Section 10901 acquisitions by "non-carriers"

Ex Parte 392, an exemption becomes effective and the transaction may be carried out seven days after the filing of a notice by the acquiring entity unless a petition to revoke the exemption has been filed and granted or the transaction is stayed by the ICC. See *ibid.*; 49 C.F.R. Pt. 1150. On September 25, 1987, the ICC denied RLEA's request for a stay, and on October 2, 1987, RLEA filed a petition to revoke Railco's exemption, which remains pending before the agency. See Pet. App. 26a-27a.

Meanwhile, P&LE requested the district court to enjoin the RLEA general strike on the ground that the work stoppage was an illegal attempt to interfere with the ICC's exclusive jurisdiction over Railco's purchase of the rail line. The court ultimately agreed and issued an injunction. *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, Civ. No. 87-1745 (W.D. Pa. Oct. 8, 1987) (findings of fact and conclusions of law).[4] The RLEA appealed, and the court of appeals summarily reversed the district court's decision. *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3d Cir. 1987) (*P&LE I*). The court held that Section 4 of the Norris-LaGuardia Act deprived the district court of jurisdiction to issue the injunction, rejecting P&LE's contention that the Norris-LaGuardia Act must be accommodated to the ICA, and remanded the case for a determination whether P&LE was obligated to comply with the Railway Labor Act bargaining procedures. P&LE has petitioned this Court for a writ of certiorari to review that decision. *Pittsburgh & Lake Erie R.R.* v. *Railway Labor*

(*i.e.*, new entrants into the railroad business), the so-called *Ex Parte 392* exemption. See 1 I.C.C. 2d 810.

[4] The district court's findings of fact and conclusions of law are reproduced in P&LE's March 24, 1988, petition for a writ of certiorari. See *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, No. 87-1589, Pet. App. B1-B10.

Executives' Ass'n, petition for cert. pending, No. 87-1589 (filed Mar. 24, 1988).

2. The foregoing events led to the present dispute. On remand, the district court held that P&LE was obligated to bargain under the Railway Labor Act concerning the effects of the proposed sale on its employees. *Railway Labor Executives' Ass'n* v. *Pittsburgh & Lake Erie R.R.,* Civ. No. 87-1745 (W.D. Pa. Dec. 21, 1987) (memorandum opinion).[5] P&LE appealed, and the ICC, through its own lawyers, intervened in the court of appeals in support of P&LE.[6] The court of appeals affirmed the district court's decision (Pet. App. 14a-84a (*P&LE II*)), specifically rejecting, among other arguments, the ICC's contention that the RLEA's assertion that P&LE must bargain with its unions constituted an impermissible "collateral attack" on the ICC's approval of Railco's acquisition (*id.* at 50a-58a). P&LE petitioned this Court for a writ of certiorari to review the court of appeals' decision. *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n,* No. 87-1888 (filed May 17, 1988). The ICC, meanwhile, requested the Solicitor General's assistance in preparing a petition for a writ of certiorari.

The Solicitor General concluded that the ICC lacked statutory authority to intervene in the court of appeals and that the ICC accordingly was not a proper party before this Court. On June 14, 1988, the Solicitor General notified the Clerk of this Court that, based on his determination that the ICC was not properly a party respondent, the

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[5] The district court's memorandum opinion is reproduced in P&LE's May 17, 1988, petition for a writ of certiorari. See *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n,* No. 87-1888, Pet. App. 71a-85a.

[6] We have reproduced the ICC's motion to intervene and the court's order granting that motion in the Addendum, *infra,* 1a-8a.

United States did not intend to file a response to P&LE's May 17, 1988, petition.[7] On August 8, 1988, the ICC filed the instant petition for a writ of certiorari, through its own lawyers, with this Court.

DISCUSSION

The United States suggests that the ICC lacked statutory authority both to intervene in the court of appeals proceeding and to petition this Court for a writ of certiorari. The ICC's petition should accordingly be dismissed for lack of jurisdiction.[8]

1. Congress has given the Attorney General plenary authority over all litigation involving the United States, its agencies, and officers except "as otherwise authorized by law" (28 U.S.C. 516, 519).[9] Thus, unless Congress has given the ICC specific statutory authority to intervene in a judicial action through its own attorneys, it must rely on

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[7] We have reproduced that letter in the Addendum, *infra,* 9a-11a.

[8] We have suggested a similar result, in a somewhat different procedural setting, in *ICC* v. *State of Texas,* No. 87-1938. In that case, the ICC also petitioned for a writ of certiorari without statutory authorization and without the Solicitor General's consent.

[9] Section 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General.

Section 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

the Attorney General's representation of its interests in the lower courts. See *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988), slip op. 11 n.9.

The ICC contends (Pet. 10) that Congress has conferred independent litigating authority on the agency in the present case pursuant to a provision of the Urgent Deficiencies Act of 1913, which is codified, as amended, at 28 U.S.C. 2323.[10] Section 2323, according to the ICC, states (Pet. 10 (emphasis added by the ICC)):

> that the Commission may appear as a party on its own motion and as of right, represented by its own counsel, in "*any* action *involving* a Commission order."

The ICC has not given the Court an accurate rendition of the statutory language. Section 2323 actually states as follows:

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[10] Prior to 1975, ICC orders were subject to enforcement and review under the Urgent Deficiencies Act of 1913, ch. 32, 38 Stat. 219. See 28 U.S.C. (1970 ed.) 1336, 2321-2325. That Act empowered the district courts to enforce and review ICC orders and further provided that an action to enjoin an ICC order had to be heard before a three-judge panel and could be appealed directly to this Court (28 U.S.C. (1970 ed.) 2325). In 1975, Congress substantially revised those provisions, preserving the district courts' jurisdiction to enforce ICC orders, eliminating judicial review by three-judge district courts, and vesting the courts of appeals with exclusive jurisdiction to review ICC orders in accordance with the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.*, which is more commonly known as the Hobbs Act. See Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917. See also H.R. Rep. 93-1569, 93d Cong., 1st Sess. 19-23 (1974) (indicating the relevant statutory revisions). The Hobbs Act procedures also control judicial review of certain final orders of the Federal Communications Commission, and certain rules, regulations, and orders of the Secretary of Transportation and the Federal Maritime Commission (28 U.S.C. (& Supp. IV) 2342).

> The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in enforcement actions and actions to collect civil penalties under subtitle IV of title 49.
>
> The Interstate Commerce Commission, and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving *the validity* of *such* order or requirement or any part thereof, and the interest of such party.
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> * * * * *

28 U.S.C. 2323 (emphasis added by the United States). The language of Section 2323, correctly rendered and read in context, allows the ICC to intervene in judicial actions brought to review or enforce ICC orders where the validity of the order is at issue. The first paragraph sets forth the Attorney General's authority to represent the government in actions to review or enforce ICC orders, and the second paragraph gives the ICC authority to intervene in those specific actions. In addition, the second paragraph makes clear that the ICC can exercise its right to intervene only when the *validity* of the ICC order being reviewed or enforced is drawn into question.[11]

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[11] The structure and context of Section 2323 indicate beyond doubt that the section's several paragraphs, which are not even demarcated as separate subsections, were intended to be read together and understood to cover the same universe of court proceedings. This textually evident construction of Section 2323 is supported by Sections 2321 and 2322, the provisions which, along with Section 2323, constitute chapter 157 of Title 28, entitled "Interstate Commerce Commission Orders; Enforcement and Review." Section 2321 describes the types of

Thus, the language on which the ICC relies does not authorize the ICC's intervention in this case. The present suit is neither a proceeding to review an ICC order under Section 2321(a), an enforcement action under Section 2321(b), nor an action under subtitle IV of title 49—the three types of actions to which Section 2323 applies. Moreover, it is a labor dispute between private parties that involves, at most, a question of the *consequences* of an ICC determination. No question has been presented involving the validity of an ICC order.[12]

The history of Section 2323 fully supports the statute's self-evident meaning. Prior to 1910, the ICA provided in relevant part:

> If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court * * * for an enforcement of such order.

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judicial procedures available to review or enforce ICC orders: actions by private parties to enjoin or suspend an order are to be brought in the court of appeals, in accordance with chapter 158, the Hobbs Act (28 U.S.C. 2321(a)); actions to enforce ICC orders other than for the payment of money or the collection of fines, are to be brought in district court "as provided in this chapter" (28 U.S.C. 2321(b)). Section 2322 provides that all actions specified in Section 2321 shall be brought "by or against the United States." Reading all three provisions of chapter 157 together confirms that the second paragraph of Section 2323 was intended to give the ICC authority to intervene only in actions to review or enforce ICC orders.

[12] The ICC argues that the RLEA's action constitutes a "collateral attack" on its exemption order in this case. However, that characterization fails to satisfy Section 2323's quite specific statutory preconditions for ICC intervention. Neither P&LE nor the RLEA has sought judicial review of the ICC order pursuant to the Hobbs Act, nor have they questioned the validity of that order in the proceedings below. Indeed, the court of appeals rejected the ICC's argument that the RLEA's suit constituted a collateral attack on the agency order. Pet. App. 50a-58a.

Act of June 29, 1906, ch. 3591, § 5, 34 Stat. 591. In 1910, Congress modified this provision to create a special "commerce court" to review and enforce ICC orders. Act of June 18, 1910 (Mann-Elkins Act), ch. 309, 36 Stat. 539. In response to President Taft's suggestion, Congress additionally included a provision that ultimately would become Section 2323. Section 5 of the Mann-Elkins Act stated, in language virtually identical to the present formulation of Section 2323, as follows (36 Stat. 543):

> That the Attorney-General shall have charge and control of the interests of the Government in all cases and proceedings in the commerce court * * *: *Provided,* That the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right * * * in any suit wherein is involved the validity of such order or requirement or any part thereof * * *.

President Taft had urged the passage of legislation restricting the ICC's litigating authority for the following reasons:

> "Under the existing law, the Interstate Commerce Commission itself initiates and defends litigation in the courts for the enforcement, or in the defense, of its orders and decrees, and for this purpose it employs attorneys who, while subject to the control of the Attorney-General, act upon the initiative and under the instructions of the commission. This blending of administrative, legislative, and judicial functions tends, in my opinion, to impair the efficiency of the commission by clothing it with partisan characteristics and robbing it of the impartial judicial attitude it should occupy in passing upon questions submitted

> to it. In my opinion all litigation affecting the Government should be under the direct control of the Department of Justice; and I therefore recommend that all proceedings affecting orders and decrees of the Interstate Commerce Commission be brought by or against the United States *eo nomine,* and be placed in charge of an Assistant Attorney General acting under the direction of the Attorney General."

H.R. Rep. 923, 61st Cong., 2d Sess. 3 (1910) (quoting President Taft).[13] Thus, Section 5 was intended to limit the ICC's role in conducting litigation by giving the Attorney General authority over cases involving the review and enforcement of ICC orders that the ICC had previously conducted exclusively through its own attorneys. See also H.R. Rep. 923, *supra,* at 8; S. Rep. 355, 61st Cong., 2d Sess. 5-7 (1910). Section 5 was subsequently included in the 1911 compilation of the judicial code. See Act of Mar. 3, 1911, ch. 231, § 212, 36 Stat. 1150.

The Urgent Deficiencies Act (Act of Oct. 22, 1913, ch. 32, 38 Stat. 219) abolished the commerce courts but retained the essence of Section 5 of the Mann-Elkins Act (36 Stat. 543), which was ultimately codified as 28 U.S.C. 2323. See *ICC* v. *Southern Ry.,* 543 F.2d 534 (5th Cir. 1976), rehearing en banc denied, 551 F.2d 95 (1977). Section 2323 remained essentially unchanged until 1975, when Congress substantially revised the procedures governing judicial review of ICC orders. See Act of Jan. 2, 1975, Pub. L. No. 93-584, 88 Stat. 1917. Congress preserved the

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[13] The House bill, as reported, provided that "the Attorney General shall have charge and control of the interests of the Government" but gave the ICC no opportunity to participate in the court proceedings. See H.R. Rep. 923, *supra,* at 21-22. The provisions permitting ICC intervention were added in the course of the legislative debate. See 45 Cong. Rec. 7575-7576 (1910).

district court's jurisdiction to enforce ICC orders but vested the courts of appeals with exclusive jurisdiction to review ICC orders in accordance with the Hobbs Act (28 U.S.C. 2341 *et seq.*). See note 10, *supra*. Those statutory revisions required a technical revision of Section 2323 but resulted in no substantial change to the provisions of that section relevant here. See H.R. Rep. 93-1569, 93d Cong., 1st Sess. 19-23 (1974) (indicating the relevant statutory revisions).[14]

The legislative history thus demonstrates quite persuasively that Section 2323 means what it says. It permits the ICC to intervene in agency review and enforcement proceedings in which the United States is already a party, but it does not give the ICC independent litigating authority in any other context. The United States accordingly submits that the ICC lacked statutory authority to intervene in this action and it is therefore not a proper party respondent in this case.

2. The ICC also asserts (Pet. 9) that, if the agency were a proper party below, there would be no obstacle to the ICC petitioning this Court for a writ of certiorari. The United States disagrees.

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[14] The ICC mistakenly relies (Pet. 10-13) on the 1974 House Report to support its proposition that the ICC has broad authority to intervene in any case that affects its interests. The legislation at issue there was concerned solely with direct judicial review of ICC orders, and the legislators' discussion of the ICC's power to intervene arose in that context. See, *e.g.*, H.R. Rep. 93-1569, *supra*, at 8 (discussing the ICC's request for authority "to defend its actions at all levels of *judicial review* independent of the discretion of the Attorney General") (emphasis added). The House report (including the portions the ICC extensively cites (Pet. 12-13)) confirms Congress's intention that the Attorney General would have general responsibility for representing the ICC's interests in actions to review ICC orders and that the ICC would have authority to intervene solely to defend the validity of its orders in those proceedings. See H.R. Rep. 93-1569, 93d Cong., 1st Sess. 8-9, 15-18 (1974).

Section 518(a) of Title 28 gives the Attorney General and the Solicitor General exclusive power to represent the interests of the United States and its agencies in the Supreme Court, whether or not Congress has given an agency authority to litigate in the lower courts. Section 518(a) provides that the Attorney General and the Solicitor General shall conduct and argue all suits and appeals in the Supreme Court, "[e]xcept when the Attorney General in a particular case directs otherwise." On occasion, the Attorney General (or the Solicitor General, pursuant to the delegation of authority contained at 28 C.F.R. 0.20) has exercised that authority to permit an agency to file a brief in the Supreme Court in its own name, rather than having the Solicitor General represent it. But the existence of the discretionary authority to allow exceptions simply underscores the firmness of the otherwise applicable rule. See *United States* v. *Providence Journal Co.*, No. 87-65 (May 2, 1988).

Congress has created a limited statutory exception to this rule in the case of Hobbs Act proceedings to review agency orders, where it has provided that "[t]he United States, the agency, or an aggrieved party may file a petition for a writ of certiorari" (28 U.S.C. 2350). But Section 2350's statutory authorization is strictly circumscribed by that section's carefully drawn terms. Section 2350 permits a petition *only* from: (1) an interlocutory order of the court of appeals granting or denying an injunction of an agency order; or (2) a final judgment of the court of appeals on review of the agency order.[15] The ICC (or for that

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[15] Section 2350(a) specifically provides:

> An order granting or denying an interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided

matter the United States or an aggrieved party) may not file a petition to review a court of appeals decision pursuant to 28 U.S.C. 2350 except from one of these two types of orders. The court of appeals' decision in this case obviously did not arise in a Hobbs Act proceeding, since it does not involve the review of an ICC order. Thus, Section 2350 has no relevance here.

The ICC argues, without statutory support, for a broader interpretation of its litigation authority, relying (Pet. 11) on a letter from Solicitor General Bork to Senator Quentin Burdick describing the consequences of subjecting the ICC to the Hobbs Act review process (H.R. Rep. 93-1569, *supra,* at 13-14). The ICC suggests that the Solicitor General confirmed the agency's authority to seek review in "actions involving its orders" including actions arising outside the Hobbs Act (Pet. 11). The ICC creates that impression, however, only by truncating the Solicitor General's statement (*ibid.*). The Solicitor General stated (H.R. Rep. 93-1569, *supra,* at 14 (emphasis added)):

> The Interstate Commerce Commission would continue to have the same authority to represent itself independent[ly] in the Supreme Court under S. 663 that it now has under the Urgent Deficiencies Act. Under the bill it will have the authority itself to file petitions for writs of certiorari, to oppose such petitions when filed against it, and to take any other action * * * in any cases before the Supreme Court *in which both it and the United States are parties.*

The Solicitor General's specific reference to cases "in which both [the ICC] and the United States are parties" demonstrates that his description of the ICC's litigation

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by section 1254(1) of this title. * * * The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

authority pertained only to actions for judicial review of ICC orders under the Hobbs Act. The ICC's reliance (Pet. 10-11) on various law review articles (*e.g.*, Stern, *"Inconsistency" in Government Litigation,* 64 Harv. L. Rev. 759 (1951)), is similarly misplaced. Those articles address, at most, the ICC's authority to participate in Supreme Court review of the agency's orders.

Finally, the ICC's policy argument (Pet. 13-17) that its independence would be threatened in the absence of a broad grant of independent litigation authority is untenable. First, the ICC retains full authority under the present statutory regime to defend the validity of its orders as intervenor in Hobbs Act proceedings. Second, there is no basis for believing that Justice Department representation of the agency's interests in other matters will substantially infringe upon the agency's performance of its assigned duties. And third, the question of the ICC's litigation authority, as well as the scope of the agency's independence itself, are (within constitutional limitations) statutory questions committed to the judgment of Congress.

CONCLUSION

The petition for a writ of certiorari should be dismissed.

Respectfully submitted.

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SEPTEMBER 1988

ADDENDUM A

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-3797

PITTSBURGH & LAKE ERIE RAILROAD CO., APPELLANT

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLEE

[Filed Dec. 4, 1987]

MOTION OF THE INTERSTATE COMMERCE COMMISSION TO INTERVENE IN SUPPORT OF THE APPELLANT

Appellant seeks an order for Summary Reversal of an injunction issued by the United States District Court for the Western District of Pennsylvania (Civil Action No. 87-1745, November 24, 1987), enjoining appellant from consummating the sale of the Pittsburgh and Lake Erie Railroad Company (P&LE) until the railroad has exhausted the Railway Labor Act's, 45 U.S.C. § 151 *et seq.*, (RLA) bargaining and mediation procedures.

The Interstate Commerce Commission, by and through its undersigned attorneys, hereby moves to intervene in support of the appellant in the above-captioned action pursuant to Rule 27 Federal Rules of Appellate Procedure. The Commission should be authorized to intervene be-

cause in enjoining the sale the district court has prevented consummation of a transaction authorized by the Commission under the Interstate Commerce Commission Act [*sic*] (ICA) which vests exclusive and plenary jurisdiction over all aspects of the sale of P&LE in the Commission. The exclusive and plenary nature of the Commission's authority has been uniformly held until now to override the provisions of the RLA to the extent necessary to carry into effect the order of the Commission permitting the transaction. All the courts that have considered this issue have squarely found the Commission to have authority to resolve labor disputes arising out of authorized transactions. See, for example, *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794 (1st Cir. 1986); at 800. *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n,* 503 F.2d 58, 62-63 (7th Cir. 1974); *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd* on other grounds, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir.) at 430-431; *cert. denied,* 375 U.S. 819 (1963); *RLEA* v. *Staten Island R.R. Co.*, 792 F.2d 7 (2d Cir. 1986); *cert. denied,* 107 S.Ct. 927 (1987).

Moreover, the court erred in finding no basis for the exclusivity of the ICC's jurisdiction and the ICA's ability to override other laws when such a result is necessary to consummate a previously approved transaction. Courts have recognized agencies' authority to override RLA rights in the absence of express authority to do so. See *Kent* v. *CAB,* 204 F.2d 263 (2d Cir.) *cert. denied,* 346 U.S. 826 (1953).

Finally, the Court's distinguishing of one case in support of Appellants' position is improper. *RLEA* v. *Staten Island Railroad Co., supra* may not be limited to instances in which the Commission has granted an exemption but the sale has not been consummated. To hold this would

grant or deny Commission jurisdiction on the basis of a foot race. If the parties opposing a sale get to a court before the parties favoring a sale receive an exemption from the Commission and close, the opposing party wins. This result is, of course, untenable.

The Commission must be allowed to intervene as a matter of right. First, as RLEA's position is, in effect, a denial of Commission jurisdiction, the Commission is properly before the court to defend its jurisdiction. *Cf. Telecommunications Research and Action Center* v. *FCC,* 750 F.2d 70, (D.C. Cir. 1984). Second, Rule 24(a)(2) Federal Rule of Civil Procedure, the basic standard for granting intervention permits intervention of right "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Harris* v. *Pernsley,* 820 F.2d 592 (3rd Cir. 1987) citing, *Commonwealth of Pennsylvania* v. *Rizzo,* 530 F.2d 510, 503 (3rd Cir.) *cert. denied sub nom. Fire Fighters Union* v. *Pennsylvania,* 426 U.S. 921, (1976). The Court's order strikes at the heart of ICC authority over the sale of rail lines in this country. Authority given to the Commission by Congress as an aid to the Commission's implementation of the National Transportation Policy and the ICC's operating statutes [*sic*].

Only full intervention will permit the Commission adequately to protect its interests in these proceedings. See *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528, 538 fn.10 (1971). Where the court announced that the Rule is satisfied if the applicant shows that representation of his interest may be inadequate; and the burden of making that showing should be treated as minimal [*sic*] . As stated above the Commission's interests differ from those

of the private parties. The Commission here claims exclusive jurisdiction over the transaction ruled upon by the District Court. The ICC has a legitimate interest in protecting its claim which entitles the agency to intervention, *Newport News Shipbuilding & Drydock Co.* v. *Peninsula Shipbuilders,* 646 F.2d 117, 121 (4th Cir. 1981). In any event, the Commission is the only person before the court charged with protecting the public in connection with authorizing the transaction out of which the instant litigation arose. Moreover, only full intervenor status will afford the Commission the right to appeal any adverse decision by this court. We believe this Court improperly denied the Commission intervenor status at an earlier stage of this proceeding in the companion case of *RLEA* v. *P&LE,* No. 87-3664, October 25, 1987 and reiterate our request to preserve our right to appeal the court's adverse determination in that proceeding as well as any limitations the court may consider imposing upon the Commission's participation in this proceeding.

CONCLUSION

For the foregoing reasons, the motion of the Interstate Commerce Commission to intervene should be granted.

Respectfully submitted,

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General Counsel

HENRI F. RUSH
Deputy General Counsel

/s/ Clyde J. Hart, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this the 3rd day of December, 1987, I have served true and accurate copies of the foregoing Motion of the Interstate Commerce Commission to Intervene As An Appellant upon counsel for all parties by express mail, postage prepaid, as follows:

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/s/ Clyde J. Hart, Jr.
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Attorney

ADDENDUM B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 87-3797
(W.D. Civ. No. 87-1745)

RAILWAY LABOR EXECUTIVES' ASSOCIATION

v.

PITTSBURGH & LAKE ERIE RAILROAD CO., APPELLANT

[Filed Dec. 10, 1987]

ORDER

Present: BECKER, HUTCHINSON and COWEN, Circuit Judges.

IT IS HEREBY ORDERED AS FOLLOWS:

1. Appellant's emergency motion for summary reversal or, in the alternative, for stay of injunction pending appeal is denied.

2. The motion by the Interstate Commerce Commission for leave to intervene in support of appellant is granted. Additionally, the National Railway Labor Conference is granted leave to file a brief amicus curiae.

3. The Court, sua sponte, expedites the appeal, which will be listed for oral argument before the above panel on Wednesday, January 6, 1988 at 10:00 a.m. Each side will be allotted 35 minutes. On appellants' side, Pittsburgh & Lake Erie shall be allotted 25 minutes, and the I.C.C. 10 minutes.

4. Appellants shall file and serve their briefs on the merits by Thursday, December 17, 1987. Leave is granted to appellant Pittsburgh & Lake Erie Railroad Company to file a brief in excess of 50 pages. Appellee shall file and serve its responsive brief on or before Wednesday, December 30, 1987. Appellants shall file and serve their reply brief by the close of business on Monday, January 4, 1988. The parties shall confer forthwith with respect to the preparation of a joint appendix which shall be filed no later than Monday, December 28, 1987.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

Dated: Dec. 10, 1987

cc: SMO
RJM
SWG
JOBC
CJH
RLW

ADDENDUM C

[SEAL]

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530
June 14, 1988

Honorable Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *The Pittsburgh & Lake Erie Railroad Company, Petitioner,* v. *Railway Labor Executives' Association,* No. 87-1888

Dear. Mr. Spaniol:

The Solicitor General has determined that the Interstate Commerce Commission is not properly a party respondent and has not authorized the filing of a responsive brief in this case.

Sincerely,

Charles Fried
Solicitor General

cc:

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